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## Public Prosecutor v Kanageswaran a/l Siwapirkasam

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HIGH COURT (ALOR SETAR) — CRIMINAL TRIAL NO 45B-02–08 OF 2013
CHOO KAH SING JC
13 DECEMBER 2015

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*Criminal Law — Offences — Murder — Accused charged for offence of murder — Inconsistencies in testimonies of witnesses — Whether prima facie case proven — Penal Code s 302*

D

*Evidence — Witness — Inconsistencies in testimonies — Accused charged for offence of murder — Whether safe to accept fact that accused shot deceased as true when weighed against other evidence — Whether evidence of witnesses credible, reliable and trustworthy*

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The accused was charged for the offence of murder of one Kaliany a/p Krishnan ('the deceased') under s 302 of the Penal Code. In this case, the deceased's adopted son ('SP1'), the deceased's son ('SP4') and a cousin brother of SP4 ('SP3') claimed that they saw the accused shot the deceased. According to SP3, he was terrified after he saw the shooting and wanted to leave, on the way out; he rammed his car into a Tamil school. However, according to SP4, he saw SP3 ram his car into the school first before the shooting incident. When SP3 rammed his car into the school, SP4 went to help SP3 and then ran back to the house and saw SP1 outside the house. Nevertheless, SP1 did not mention anything about seeing SP4 running back home or seeing or hearing SP3's car ram into the school. SP1 only saw the accused shooting in his direction and at that moment, the deceased came out from the house and was shot. At the crime scene, the crime scene investigator ('SP2') found six machetes and three cartridge cases. However, no fingerprint was found or detected on the machetes and no analysis was conducted on the cartridge cases. Further, there was no gunshot residue ('GSR') found on the accused.

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**Held**, acquitting the accused at the close of the prosecution's case:

(1) The veracity of the narrations of SP1, SP3 and SP4 could not converge to one coherent sequence of events. They were in contradiction with each other. They were disjointed as to what had happened on that evening, when the deceased got shot, and how the sequence of events unfolded. The common fact that they saw the accused shot the deceased prompted the court to be cautious as to the likelihood of concoction of evidence to frame the accused. The court found it unreliable and unsafe to accept the

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purported fact that the accused shot the deceased as true when weighed against all the other evidence in totality (see paras 54–56).

(2) Based on the demeanour of SP1, SP3 and SP4, their testimonies were unreliable. Their evidence was inherently not credible because there were many unexplained facts evidently found at the crime scene, yet they chose to say nothing about them. This was especially so in the testimony of SP1. He claimed he was standing outside the house, yet he claimed he saw nothing other than those purported facts which he selectively narrated (see para 69).

(3) Based on all the inconsistent evidence and the demeanour of the witnesses, the court found that the testimonies of the witnesses did not reach the threshold that the prosecution story 'must be true' as propounded in the case of *Public Prosecutor v Saimin & Ors* [1971] MLJ 16. When there are two versions of the prosecution's story on a particular material fact and each would strike out the other, then the evidence would be unreliable or untrustworthy as in the present case (see para 70).

(4) The machetes, cartridge cases, the GSR analysis report and the bullet recovered from the crime scene could not in any manner implicate that the accused committed the offence. No pistol was recovered from the crime scene. All the evidence adduced by the prosecution could not point to the guilt of the accused. The only link between the accused and the killing of the deceased was that of the testimonies of SP1, SP3 and SP4. Unfortunately, the veracity of these testimonies was seriously questionable. The prosecution had failed to prove that the accused was the one who committed the act of shooting the deceased. Thus, the prosecution had failed to prove prima facie case at end of the prosecution's case (see paras 76 & 79).

**[Bahasa Malaysia summary**

Tertuduh dituduh bagi kesalahan membunuh seorang yang bernama Kaliany a/p Krishnan ('si mati') di bawah s 302 Kanun Keseksaan. Dalam kes ini, anak angkat si mati ('SP1'), anak si mati ('SP4') dan sepupu lelaki SP4 ('SP3') mendakwa yang mereka melihat tertuduh menembak si mati. Mengikut SP3, dia amat takut selepas melihat tembakan tersebut dan hendak pergi dari situ, semasa keluar; dia melanggar keretanya masuk ke dalam sekolah Tamil. Walau bagaimanapun, mengikut SP4, dia nampak SP3 melanggar keretanya masuk ke dalam sekolah dahulu sebelum kejadian tembakan. Apabila SP3 melanggar keretanya masuk ke dalam sekolah, SP4 keluar membantu SP3 dan berlari balik ke rumah dan melihat SP1 berada di luar rumah. Walau bagaimanapun, SP1 tidak memberitahu apa-apa mengenai dia melihat SP4 berlari balik ke rumah atau melihat atau mendengar kereta SP3 melanggar masuk ke dalam sekolah. SP1 hanya melihat tertuduh menembak dalam arahnya dan pada ketika itu, si mati keluar daripada rumah dan ditembak. Di tempat kejadian,

penyiasat di tempat kejadian ('SP2') mendapati enam parang dan tiga bekas kartrij. Walau bagaimanapun, tiada cap jari didapati atau dikesan dan tiada analisis dijalankan ke atas bekas kartrij. Selanjutnya, tidak terdapat sisa tembakan ('ST') didapati atas tertuduh.

**Diputuskan**, membebaskan tertuduh pada akhir kes pihak pendakwaan:

(1) Kebenaran penceritaan of SP1, SP3 dan SP4 tidak dapat bertumpu kepada satu urutan koheren kejadian. Mereka bertentangan antara satu sama lain. Mereka tidak berurutan mengenai apa yang berlaku pada malam tersebut, apabila si mati ditembak, dan bagaimana urutan kejadian tersebut berlaku. Fakta sama yang mereka lihat tertuduh menembak si mati yang membuat mahkamah berhati-hati kepada kemungkinan campuran keterangan untuk memerangkap tertuduh. Mahkamah mendapati ia tidak boleh dipercayai dan tidak selamat untuk menerima fakta yang dipersoalkan bahawa tertuduh menembak si mati sebagai benar apabila menimbang terhadap kesemua keterangan lain secara keseluruhan (lihat perenggan 54–56).

(2) Berdasarkan atas sikap SP1, SP3 dan SP4, keterangan mereka tidak boleh dipercayai. Keterangan mereka adalah secara inherens tidak boleh dipercayai kerana terdapat banyak fakta yang tidak boleh dijelaskan secara jelas didapati di tempat kejadiaan, tetapi mereka memilih untuk tidak berkata apa-apa mengenainya. Ini adalah terutamanya di dalam keterangan SP1. Dia mendakwa dia berdiri di luar rumah, tetapi mendakwa yang tidak melihat apa-apa yang lain kecuali fakta yang dipersoalkan yang diceritakan secara terpilih olehnya (lihat perenggan 69).

(3) Berdasarkan atas kesemua keterangan yang tidak konsisten dan sikap saksi-saksi, mahkamah mendapati bahawa keterangan saksi-saksi tidak mencapai kepada ambang bahawa cerita pihak pendakwaan 'must be true' seperti yang dinyatakan dalam kes *Public Prosecutor v Saimin & Ors* [1971] MLJ 16. Apabila terdapat dua versi cerita pihak pendakwaan atas fakta material tertentu dan setiap akan membatalkan yang satu lagi, oleh itu keterangan tidak boleh dipercayai seperti dalam kes ini (lihat perenggan 70).

(4) Parang, bekas kartrij, laporan analisis ST GSR dan peluru yang ditemui daripada tempat jenayah tidak dapat dalam cara mana mengaitkan bahawa tertuduh melakukan kesalahan tersebut. Pistol tidak ditemui daripada tempat kejadian. Kesemua keterangan yang dikemukakan oleh pihak pendakwaan tidak dapat menunjukkan kesalahan tertuduh. Satu-satunya hubungan di antara tertuduh dan pembunuhan si mati adalah bahawa keterangan SP1, SP3 dan SP4. Malangnya, kebenaran keterangan-keterangan ini adalah serius dipersoalkan. Pihak pendakwaan telah gagal untuk membuktikan bahawa tertuduh adalah

A seorang yang melakukan tindakan menembak si mati. Oleh itu, pihak pendakwaan telah gagal untuk membuktikan kes prima facie pada akhir kes pihak pendakwaan (lihat perenggan 76 & 79).]

**Notes**

B For cases on inconsistencies in testimonies, see 7(3) *Mallal's Digest* (5th Ed, 2015) paras 3549–3554.
For cases on murder, see 4(2) *Mallal's Digest* (5th Ed, 2015) paras 1911–1919.

**Cases referred to**

C *PP v Kua Tiong Ann* [2009] MLJU 169; [2009] 7 AMR 788, HC (refd)
*PP v Saimin & Ors* [1971] 2 MLJ 16 (refd)

**Legislation referred to**

D Criminal Procedure Code ss 180(2), (3), 399
Penal Code s 302

*Naizatul Zima (Deputy Public Prosecutor, Attorney General's Chambers) for the plaintiff.*
*Rayer (Nethaji Rayer & Co) for the defendant.*

E

**Choo Kah Sing JC:**

INTRODUCTION

F **[1]** Kanageswaran a/l Siwapirkasam ('the accused') was charged for the offence of murder under s 302 of the Penal Code which carries a mandatory death sentence upon conviction. He was alleged to have murdered one Kaliany a/p Krishnan ('the deceased') on 17 September 2012.

G **[2]** The charge reads as follows:

> Bahawa kamu, pada 17/9/2012, jam lebih kurang 11.45 malam, di hadapan rumah No: A-4, Ladang Bukit Lembu, Sg. Lalang, Bedong, di dalam daerah Sg. Petani, di dalam Negeri Kedah, dengan niat telah melakukan kesalahan bunuh menyebabkan
H kematian seorang Kaliany a/p Krishnan KP: 551127-02-5266, dengan menembak sepucuk pistol, telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Kesiksaan.

**[3]** The prosecution called 12 witnesses in its case. The witnesses were as
I follows:

> Public Witness:
>
> SP1: Yogaraj a/l Nadarajan (the deceased's adopted son)
>
> SP3: Murugan a/l Nathan (a cousin brother of SP4)

SP4: Karthiravan a/l Thanimalai (the deceased's son)

SP10: Thanimalai a/l Muthu (the deceased's husband)

Pathologist:

SP6: Dr. Bhupinder Singh

Police Forensic Department:

SP2: Esmahaslia bte Abu Bakar – Crime Scene Investigator

SP7: DSP Abdul Ghani – Forensic Lab PDRM, Cheras.

Police Officers

SP5: Kpl Rezali – photographer

SP8: Insp Mohd Suhaimi

SP9: Kpl Rengan – store keeper

SP11: Abdul Jalil B. Abdul Rahman – Chemist, JKM.

SP12: ASP Ahmad Tarmizi – Investigation officer

**[4]** The crux of the prosecution's case mainly centred on the testimonies of SP1, SP3 and SP4 who claimed that they saw the accused shot the deceased on the fateful evening of 17 September 2012.

**[5]** At the close of the prosecution's case, I carried out a maximum evaluation of the evidence of the prosecution's case, particularly of the testimonies of SP1, SP3 and SP4. Upon having painstakingly scrutinised through the testimonies of SP1, SP3 and SP4, especially in relation to what actually transpired in Ladang Bukit Lembu on that fateful night, I found the testimonies of SP1, SP3 and SP4 were inconsistent and unreliable. There were variances of narration as to what had happened that evening. I was doubtful as to which version I should accept and believe. On this premise, I found the prosecution has failed to prove a prima facie case as it is required to do under s 180(3) of the Criminal Procedure Code ('the CPC') before the court shall call upon the accused to enter on his defence.

**[6]** Pursuant to s 180(2) of the CPC, I found the prosecution has not made out a prima facie case against the accused. Hence, I recorded an order of acquittal on the charge against the accused at the close of the prosecution's case on 1 November 2015.

THE FINDINGS OF THIS COURT

**[7]** In order to appreciate the findings of this court, it is prudent first to relate the relevant parts of the testimonies of SP1, SP3 and SP4 in relation to what

they had individually encountered at Ladang Bukit Lembu on the fateful night, ie 17 September 2012.

*The testimony of SP1*

**[8]** SP1 is the adopted son of the deceased. He recalled that on that fateful night, around 10pm to 11pm, while he was having a cigarette with a friend (by the name of Prakash) at a lane near the deceased's house (see exh P1, marked 'L' — the deceased house), he heard rowdy noise coming from a Tamil school nearby (see exh P1, marked 'E'). The Tamil school is located about a stone's throw from where he was standing (see exh P1, marked 'Z'). He went closer to have a look and saw there were four persons attacking a male person. He said: 'Saya nampak ada lebih kurang 4 orang memukul seorang lelaki dan menetak lelaki tersebut'. (see p 9 of the notes of evidence).

**[9]** SP1 could not see clearly who those people involved in the fight were. Later in the proceeding, he identified the person being attacked as one Devan. SP1 said he shouted at those people, and he saw those people running towards him. At that material time he was standing in front of the deceased's house (see exh P1 — marked 'L').

**[10]** He recounted that those people started shooting, and he saw the accused holding a pistol and shooting at his direction. The accused was standing in front of him, whereas one of the assailants was standing behind the accused, SP1 told the court.

**[11]** The accused fired several shots at SP1, but missed him. SP1 said he ran and hid behind a shrine which is built in the porch of the deceased's house. He also said that the accused was standing outside the gate in front of the deceased's house. The accused started shooting at the direction of the house, SP1 claimed. It was at that moment that the deceased came out from the house and was shot.

**[12]** SP1 testified that at that material time, a person by the name of 'Kaili' was standing next to the accused. Kaili did nothing, SP1 said. Kaili's real name is Magen a/l Kanesan, SP1 told the court during cross-examination.

**[13]** SP1 recounted that when the deceased fell on the floor, he quickly held her and saw the right side of the deceased's face bleeding. He then saw the accused and his friends run off. While SP1 was holding the deceased, SP10 and his brothers came out from the house. SP1 testified that he was alone at the porch when the deceased was shot.

**[14]** SP1 told the court that his neighbours were not willing to help send the deceased to the hospital. It was his friend Sri Tharan who has a car who took the deceased to the hospital. SP1 said Sri Tharan and his neighbour one Nagayah took the deceased to the hospital.

**[15]** SP1 also told the court that he knew the accused because SP1 befriended the accused's older brother since he was young.

**[16]** SP1 testified that he saw the accused holding a pistol with his two hands and also saw the pistol spark fire approximately three times.

**[17]** In cross-examination, SP1 told the court that he and his brothers, namely, Kathiraven ('SP4'), Charen and Nagendren, and his cousin brother Murugan ('SP3') were arrested. They were remanded for 11 days. He and his brothers were charged and convicted for the offence 'bergaduh dengan jiran'. They were fined RM22,000 by the magistrate court in Sungai Petani.

**[18]** He admitted that the damage to the property shown in pictures 19–28 in exh P2 was caused by him and his brothers. He told the court that he and his brothers were furious over the neighbours' unwillingness to help send his mother to the hospital. Out of anger, SP1 and his brothers broke and damaged their neighbours' car, van, motorcycle and house windows (see pictures 19–28 in exh P2).

**[19]** Exhibit P2, pictures 5–11 show the extent of the damage to the vehicle Honda WGY 7007. Whereas, pictures 12–17 show the extent of the damage to the vehicle Proton JFV 1741.

**[20]** SP1, when asked by the defence counsel as to whether he knew anything about the damage as shown in pictures 3–17 in exh P2, answered in the negative.

**[21]** Pictures 3–17 and 33–35 in exh P2 were shown to SP1 by the defence counsel, and the defence counsel put it to SP1 that he was not telling the truth because he did not reveal what caused the damage. SP1 answered: 'Sebab benda-benda ini semua saya tidak nampak' (see p 35 of the notes of evidence). SP1 said he did not see how the two vehicles, namely, Honda WGY 7007 and Proton JFV 1741, were damaged as shown in those pictures.

**[22]** SP1 testified that he did not know the owner of vehicle Honda WGY 7007, whereas, the vehicle Proton JFV 1741 belonged to his cousin brother Murugan ('SP3').

**[23]** In re-examination, SP1 told the court, inter alia, that he did not know whether the vehicle Proton JFV 1741 was damaged before or after the deceased was shot.

*The testimony of SP3*

**[24]** SP3 told the court that on that evening, he went to visit a friend named Chinathurai, but the family was not at home. He then stopped by the house of another friend named Subramaniam in Ladang Bukit Lembu. He was chatting with Subramaniam and a few other friends at the porch of the house. Suddenly, they heard rowdy noise coming from a school nearby. They stood up to find out what was going on.

**[25]** SP3 told the court that the next minute he saw the accused standing in front of the deceased's house and also saw the accused shoot the deceased. He also told the court that he went over to the deceased house. He was approximately 15 feet away from the accused where the incident happened. He saw the accused holding a pistol with his both hands and shot the deceased. After that he heard someone said that the accused shot his mother (see p 58 '... ada orang bercakap Kanageswaran menembak emaknya').

**[26]** SP3 claimed that he saw the deceased being shot, but not sure where she was at that time (see p 60 of the notes of evidence). Later in evidence, SP3 said the deceased was outside the house.

**[27]** The learned deputy public prosecutor asked SP3 the following question:

> Q: Ada orang lain lagi bersama Kanageswaran?
>
> A: Hanya melihat Kanageswaran seorang sahaja.

**[28]** SP3 recounted that after witnessing what had happened, he was terrified and went straight to his car wanting to leave the place. On his way out, he hit a bump and lost control of his car. He rammed into the Tamil school building. He was driving a Wira Aeroback (Proton) with the registration No JFV 1741.

**[29]** SP3 said before he could get out from his car, four men armed with machetes came and attacked him. He managed to escape although his left hand and head were slashed and injured by those men. He recognised two of them, they were Kattukarupu and Bantha. The four men left him, and the accused came. The accused was holding a pistol and walking towards him. SP3 related that the accused told him to run. SP3 said the accused stated as follows: 'Kamu

nak langgar saya ke? Larilah pengecut'. SP3 quickly ran off. He went round the school and made his way back to the deceased's house.

**[30]** In cross-examination, SP3 told the court that he had lodged a police report after he was discharged from the hospital. The learned deputy public prosecutor was not aware of the police report. The learned deputy public prosecutor did not have a copy of SP3's police report in her investigation papers.

**[31]** SP3 told the court that he lodged the police report only two or three weeks after the incident. The police report 'BEDONG/004280/12' was produced by SP3 in cross-examination, and it was marked as exh 'D1'. SP3 could not read the content of the police report, because he was illiterate. He told the court that a police officer translated the content to him in Tamil language at the police station.

**[32]** The content of exh D1 is reproduced as follows:

> PADA 17/09/2012 JAM LEBIH KURANG 11.45 MALAM SEMASA SAYA BERADA DILUAR KAWASAN RUMAH YANG BERALAMAT A4 BUKIT LEMBU 08100 BEDONG KEDAH, TIBA-TIBA DATANG SEKUMPULAN LELAKI INDIA MENAIKI KERETA DAN MOTORSIKAL DENGAN MEMBAWA PARANG DAN PISTOL TERUS SERANG KAMI. SEMASA KEJADIAN SAYA DAN YOGARAJ A/L NADARAJAN NO. KP 850315-02-5609 TELAH TERNAMPAK SALAH SEORANG DARIPADA SERANGGAN GANAS IAITU KANAGESWARAN, KALI, MURALI@ KATHUKARUPU, MEGAN @ KAHILHI, THIBAGARAN @ BANTHA DAN JINTHE TELAH MENEMBAK SEORANG PEREMPUAN IAITU KALIANY A/P KRISHNAN DAN BELIAU TELAH MENINGGAL DUNIA. TUJUAN KAMI MEMBUAT LAPORAN SUSULAN INI ADALAH UNTUK PIHAK POLIS MENYIASAT DAN MENDAPAT SATU KEADILAN KEPADA KELUARGA KALIANY YANG MENJADI MANGSA KORBAN KEJADIAN INI. SEKIAN LAPORAN SAYA.

**[33]** SP3 confirmed the content stated in D1 when it was translated to him by the court's interpreter, particularly the part which stated that he saw one of the persons from the group shoot the deceased.

**[34]** Defence counsel put it to SP3 that he was lying when he gave evidence earlier in court that he saw it was the accused who shot the deceased, whereas, in the police report he did not specify who shot the deceased. SP3 denied that he was lying in court. In re-examination, SP3 stated that he did tell the police it was the accused who shot the deceased. Why it was not stated in the report, he did not know.

*The testimony of SP4*

**[35]** SP4 is the son of the deceased. He recounted that around 10pm that night, he heard loud noise which sounded like firecracker explosion. He was in the deceased's house at that time. The sound got louder and louder and nearer and nearer to his house. He went out from the house and saw someone being attacked by several persons next to a school in front of his house. The person being attacked was running towards his direction. SP4 was alone at the porch of his house which is approximately 25–30 feet away from the incident. He quickly went back into the house.

**[36]** He heard a loud 'bang' which sounded like an explosion. He went out from the house to find out what it was. He saw his uncle's car (SP3) go pass his house and ram into the school. He then saw four persons attacking his uncle (SP3). He went to help his uncle. His hand got slashed by the assailants. He went back to his house. He claimed that it was Magen who slashed him.

**[37]** He saw his brother ('SP1') outside the house on his way back. His mother, the deceased, came out from the house. She was looking for his brother, SP4 said. The deceased went out from the house when the accused was shooting in front of the house, it was at that material time the deceased was shot, SP4 told the court.

**[38]** SP4 saw the accused from the window. He said the accused was holding a gun with his both hands. SP4 also said he saw his mother fall on the floor. He quickly went out to hold her. At that time, the accused already ran off. SP4 said he took his mother to his friend's car to send her to hospital, after that he went to the hospital as well.

**[39]** During cross-examination, SP4 said he did not tell anyone it was the accused who shot the deceased or lodge a police report concerning what he saw that evening.

**[40]** In order to appreciate the discrepancy of the narrations of the SP1, SP3 and SP4, it is necessary to examine the testimony of SP10, the deceased's husband, as well.

*The testimony of SP10*

**[41]** SP10, 66 years of age, testified that on that fateful evening (though he could not recall the exact date), he and his wife and the children were sitting at the porch of the house after dinner. He recalled Nagendran, Karthiravan ('SP4') (his two sons) and Devi (daughter-in-law) and the deceased were with him on that evening.

**[42]** He saw four motorcycles approaching the lane leading to his house. SP10 sensed that a fracas might happen. He quickly ordered his family members to go into the house. The neighbours, likewise, were seen going quickly into their respective houses. He could not see who those people on the motorcycles were.

**[43]** After the family members went into the house, SP10 quickly locked the door and switched off the light in the house. He told the daughter-in-law not to open the door no matter what happen. He then went to the toilet. He was in the toilet about 10–15 minutes, and suddenly, he heard the daughter-in-law screaming. He rushed out from the toilet and went to the hall. He saw the daughter-in-law looking out through the window, she shouted that her mother-in-law was shot. At that material time, the front door was still locked.

**[44]** He asked the daughter-in-law how his wife got out from the house. He was told that she went into the kitchen for a cup of water and got out from the side door from the kitchen. SP10 quickly opened the door and went out. He did not see anyone else other than the deceased. He saw his wife lying motionless at the veranda of the house. He carried her and saw her face covered with blood. He asked for help from his neighbours. Someone came and took the wife (to the hospital). He said his son Yogaraj (SP1) took her to the hospital. He did not follow her to the hospital. He went with one Rajes to the police station IPD Kuala Muda to lodge a police report. The SP10's police report 'BEDONG/003726/12' was marked as exh P3. The content of P3 is reproduced below:

> PADA 17/9/2012 JAM LEBIH KURANG 1145 MALAM SEMASA SAYA BERADA DIRUMAH ALAMAT A 4 BUKIT LEMBU 08100 BEDONG, KEDAH DUDUK SEMBANG DILUAR RUMAH BERSAMA DENGAN KELUARGA DATANG SEKUMPULAN LELAKI INDIA MENAIKI KERETA DAN M/SIKAL DENGAN MEMBAWA PARANG, KAYU DAN TERUS SERANG KAMI. SAYA TERUS TOLAK ISTERI DAN ANAK SAYA MASUK DALAM RUMAH KEMUDIAN SAYA TERDENGAR BUNYI TEMBAKAN DAN DAPATI ISTERI SAYA NAMA KALIANY A/P KRISHNAN JATUH DAN BERLUMURAN DARAH DAN PADA MASA YANG SAMA SAYA TENGOK ANAK SAUDARA SAYA NAMA MURUGAN KENA TETAK DI TANGAN. KEMUDIAN SAYA MINTA TOLONG PADA ORANG KAMPUNG DAN MINTA TOLONG BAWA ISTERI DAN ANAK SAUDARA SAYA KE HOSPITAL SULTAN ABDUL HALIM, SG. PETANI KEDAH. SEKIAN LAPORAN SAYA.

**[45]** SP10 could not remember what he had stated in P3 when the content was translated to him (in Tamil language) by the court interpreter. SP10 said the incident happened three years ago and he could not remember. SP10 told the court that he did not know who shot his wife nor did he see who shot her.

*The discrepancy in the testimonies of SP1, SP3, SP4 and SP10*

The material moment the deceased was shot

**[46]** First, there is a serious inconsistency in regard to the material time the deceased was shot by the accused in the testimonies of SP3 and SP4.

**[47]** SP3 claimed that he was terrified after seeing the deceased being shot by the accused. He wanted to leave the place. On his way out, his car hit a bump and lost control and rammed into the school. Four men armed with machetes attacked him. He was slashed. The accused came and warned him, he ran and escaped. He came back to the deceased's house later.

**[48]** In the testimony of SP4, he claimed he heard a loud noise coming from outside his house. He went out from the house, he saw SP3's car ram into a school. He also saw SP3 being attacked by four men. SP4 went to assist, he got slashed by the armed assailants. He ran back to the house. Her mother, the deceased, came out from the house looking for his brother. The accused was shooting in front of his house. It was at that moment the deceased was shot by the accused. The relevant parts of SP4's testimony are reproduced as follows:

> Q: Apa yang berlaku masa kamu balik rumah selepas ditetak?
>
> A: Saya nampak abang saya berada di luar rumah. Emak saya berada dalam rumah, mencari abang saya dan keluar dari rumah. Saya nampak Kanageswaran memegang pistol. Pada masa mak saya keluar dari rumah, Kanageswaran tengah tembak menembak di hadapan rumah saya. Apabila ibu saya keluar, ibu saya terkena tembakan itu.
>
> Q: Siapa nama abang kamu?
>
> A: Yogaraj.
>
> Q: Bagaimana kamu tahu Kanageswaran tengah tembak menembak?
>
> A: Sebab tingkap rumah saya masih terbuka. Saya Nampak Kanageswaran melalui tingkap.

**[49]** According to SP3's narration, the deceased was shot first before he rammed his car into the school. He saw the shooting; he was terrified. He wanted to leave, on the way out rammed his car into the school. Whereas, according to SP4's narration, he saw SP3 ram his car into the school first, he went to help, he came back with an injured hand. He saw the deceased, it was only then the deceased was shot. There is a serious contradiction as to the facts with regard to when the deceased was shot between the testimonies of SP3 and SP4.

**[50]** According to SP1, he claimed he did know when SP3's car ram into the school. He was outside the house all the time and smoking with his friend. There was nothing unusual in the surroundings at that time. Everything was fine until he heard and saw a fracas near a Tamil school. After shouting at the people who were involved in a fight, he saw people running towards him. The accused was holding a gun and started shooting at his direction. He hid behind a shrine in the porch. The deceased came out, and she was shot.

**[51]** SP1 did not testify that he saw SP4 running back to the house with his hand injured (slashed by the assailants). If SP3's or SP4's narration was true, SP1 would have seen or heard SP3's car ram into the school or seen SP4 running back to the house with an injured hand. SP4 said that he saw SP1 standing outside when he came back, but SP1 did not mention anything about seeing SP4 running back home or seeing or hearing SP3's car ram into the school. He only saw someone being attacked near the Tamil school.

**[52]** SP1 was standing outside the house all the time. The commotion and the loud bang, if true, would have immediately caught the attention of SP1. But, that was not his story.

**[53]** In the event SP1's narration was true, his narration could not bring together the narration of SP3 or SP4. Likewise, if the narration of SP3 was true, it could not fit into the narration of SP4, and vice versa. I was baffled as to when exactly the deceased got shot after having considered the testimonies of SP1, SP3 and SP4.

**[54]** The veracity of the narrations of SP1, SP3 and SP4 could not converge to one coherent sequence of events. They were in contradiction with each other. No two narrations could actually complement or corroborate each other. They were disjointed as to (a) what had happened on that evening; (b) when the deceased got shot; and (c) how the sequence of events unfolded.

**[55]** Placing SP1's, SP3's and SP4's narrations side by side produces an illogical sequence of events as to when the exact moment the deceased was shot by the accused. This fact is critical and crucial in the building up the prosecution's case. The entire substratum of the prosecution's case depends on the testimonies of these eye witnesses. To my dismay, the facts in these testimonies are overwhelmingly inconsistent, apart from the fact that they said they saw the accused shoot the deceased.

**[56]** It is conspicuous that the testimonies of SP1, SP3 and SP4 shared one common fact which is they saw the accused shoot the deceased. This purported common fact prompted the court to be cautious as to the likelihood of concoction of evidence, ie to frame the accused. This led me to find it

unreliable and unsafe to accept the purported fact that the accused shot the deceased as true when weighed against all the other evidence in totality. The other parts of the evidence in the three witnesses' testimonies were entirely contradictory, incoherent and incompatible.

*Other inconsistent evidence*

**[57]** SP1 told the court that at the material time when the deceased was shot by the accused, one Kaili (or Megan a/l Kanesan) was standing next to the accused in front of his house. However, SP3 told the court that he saw only the accused standing in front of the house when the accused shot the deceased.

**[58]** SP3's police report (exh D1) stated that a group of people ('sekumpulan lelaki India') armed with machetes and pistol came in a car and motorcycles attacked them. He and SP1 saw one of the assailants, comprised of the accused, Kali, Murali @ Kathukarupu, Megan @ Kahulhi, Thibagaran @ Bantha and Jinthe, shoot the deceased. Ironically, this report was not tendered in court as prosecution's document, instead it was tendered in court as defence's document.

**[59]** SP3 did not state clearly or explicitly in his police report that it was the accused who shot the deceased. He identified the accused as the person who shot the deceased at the trial after a lapse of approximately three years later. Such an important information ought to have been stated in the police report at the first available opportunity, but was not. He told the court that he did tell the police officer who recorded the police report the accused shot the deceased, but it was not stated in the report, and he did not know why. He admitted that his police report was read and translated to him in the Tamil language by the police officer. If this fact was true, SP3 would have corrected the police officer to state specifically the accused shot the deceased. His explanation is tainted with doubts.

**[60]** SP10's police report (exh P3) also stated that a group of people ('sekumpulan lelaki India') armed with machetes and sticks came in a car and motorcycles and attacked them. Clearly, SP10 did not see anyone came with a pistol as opposed to SP3's police report.

**[61]** Both the contents of the police reports (exhs D1 and P3) seemed to suggest that the makers (they) were attacked by the assailants (see D1 and P3 - '… terus serang kami'.) However, this was not the scenario as narrated in the testimonies of SP1, SP3, SP4 and SP10 in court. None of them knew how the whole fracas started in Ladang Bukit Lembu.

**[62]** SP10 stated in evidence that his sons, including SP4 (Karthiravan), were with him that night. He ordered all his family members, including SP4, to get into the house. He locked the front door. The door was kept locked all the time until SP10 went out. However, SP4's narration was different. He heard a loud bang and went out of the house. He had a fight, got injured and came back. SP10 did not in his testimony or his police report ('P3') mention that his son, SP4, was outside the house or that SP4 was injured.

**[63]** SP10 told the court that when he opened the door to reach the deceased, he did not see anyone outside the house except the deceased. He told the court as follows:

> Q: Selepas itu apa yang kamu lakukan?
>
> A: Selepas melihat isteri saya jatuh di hadapan rumah, barulah saya buka pintu.
>
> Q: Bila buka pintu kamu nampak siapa?
>
> A: Tidak nampak sesiapa, cuma nampak isteri saya.
>
> Q: Di mana kamu nampak isteri kamu?
>
> A: Di kaki lima rumah.
>
> Q: Bagaimana keadaan isteri kamu?
>
> A: Terlantar di atas lantai. Tiada apa-apa pergerakan. Apabila saya nampak isteri saya, saya mengangkat dia dan meletakkan di atas lutut saya tapi tiada apa-apa pergerakan dari isteri saya. Saya nampak muka isteri saya berlumuran darah.

**[64]** In SP1's testimony, he claimed that he was outside the house when the deceased was shot. He was the one who first reached the deceased. SP1 stated as follows:

> Q: Selepas itu apa yang terjadi kepada ibu kamu?
>
> A: Emak angkat saya terjatuh apabila terkena tembakan. Bila emak saya jatuh, saya terus memegang mak saya. Apabila saya angkat mak saya, saya nampak pipi di sebelah kanan mak saya berdarah. Apabila saya mengangkat mak saya, saya nampak Kanageswaran dan kawan-kawannya berlari dari tempat itu.
>
> Q: Bagaimana keadaan mak kamu ketika itu?
>
> A: Saya nampak banyak darah keluar dari pipi kanan ibu saya. Tiada pergerakan dari emak saya.
>
> ...

Q: Ada sesiapa lagi yang berada ditempat kejadian masa mak kamu jatuh?

A: Di dalam rumah ada adik beradik dan bapa saya. Pada masa mak saya ditembak dan jatuh, hanya saya seorang sahaja yang berada di situ.

Q: Ada orang lain bersama mak kamu?

A: Apabila saya mengangkat mak saya, bapa dan adik beradik saya keluar dari rumah.

**[65]** From the above excerpts, clearly, SP10's and SP1's narrations in regard to who was the one who first reached the deceased was in contradiction. SP10 did not see anyone outside the house when he went out, but SP1 said he was there holding the deceased.

**[66]** Following from the above excerpts, SP1 said that he saw the right side of the deceased's face bleeding when he held her. He repeated twice in evidence that the right side the deceased's face was wounded. However, in the report of post mortem examination (exh P34), the section 'Marks of Trauma/Violence' is stated as follows:

> 1. An oval entry wound was seen over the left cheek in the region of the left mandible, causing a fracture of the mandible. It measures 1.2cm in diameter with an abrasion margin measuring 0.2cm width. It was directed inwards and medially.

**[67]** The section 'Internal Examination — Face, Mouth, Throat and Neck Structures' is stated as follows:

> ... the bullet has gone through the left mandible, into the left maxilla causing a fracture and proceeded through the edge of the spinal cord and lodged into the muscles at the back of the neck. The left vertebral artery was ruptured.

**[68]** Exhibit P30 (A-N) (pictures of the post-mortem), particularly in picture D, clearly depicts where the gunshot wound was found on the face of the deceased. All the post mortem documentary evidence in regard to the wound was on the left side of the deceased's face, to be more specific, the left mandible. But, SP1 stated he saw the wound on the right side of the deceased's face.

**[69]** I have observed the demeanour of SP1, SP3 and SP4 and found that their testimonies were unreliable. Their evidence was inherently not credible because there were many unexplained facts evidently found at the crime scene, yet they chose to say nothing about them. This is especially so in the testimony of SP1. He claimed he was standing outside the house, yet he claimed he saw nothing other than those purported facts which he selectively narrated.

**[70]** Based on all the inconsistent evidence above and the demeanour of the witnesses, I was convinced that the testimonies of the witnesses did not reach the threshold that the prosecution story 'must be true' as propounded in the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16. When there are two versions of the prosecution's story on a particular material fact and each would strike out the other, then the evidence would be unreliable or untrustworthy (see *Public Prosecutor v Kua Tiong Ann* [2009] MLJU 169; [2009] 7 AMR 788). What more if there are three versions of the prosecution's story, like in the present case, the upshot of this would be fatal for the prosecution's case.

CIRCUMSTANTIAL EVIDENCE

**[71]** According to SP2, the crime scene investigator, she recovered a total of six machetes (exhs P13B, P16B, P20B, P21B, P22B and P23B — see exh P2 as shown in picture 55) from the crime scene. Three (P20B, P21B and P22B) out of the six machetes were found in front of the deceased's house (see paras 10–11 of exhibit P4 - SP2's witness statement). Throughout the prosecution's case, not an iota of evidence was led to explain how and why these weapons were left in front of the deceased's house.

**[72]** SP2 was instructed to collect the Gunshot Residue ('GSR') from the accused and one Murali a/l Shunmugam. The GSR were then handed to SP12, the investigating officer. SP12 instructed SP8 to forward, inter alia, the GSR to SP11, the chemist, for examination. The two GSR (P27 (and its contents – P27A, P27B, P27C and P27D) and P29 (and its contents – P29A, P29B, P29C and P29D)) were in turn forwarded to a science officer Sivabalan a/l Nagayah from the Department of Chemistry Malaysia, Petaling Jaya for a Scanning Electron Microscope analysis. The result came back in the report under s 399 of the Criminal Procedure Code, Lab number (PJ)FOR 13523/12–0, dated 22 November 2012 (exh P63), wherein, particularly in the section 'Result and Conclusion', where it was stated as follows:

> On analysis I did not detect any gunshot residue in any of the metal stubs.

**[73]** SP2 stated in her statement (exh P4) at para 12 that she had instructed Kpl 91490 Che Ramlan to examine any fingerprints on the items seized from the crime scene, and no fingerprint was found or detected.

**[74]** SP2 also recovered from the crime scene three cartridge cases, namely R&P.45 Auto (exh P12A), R.AI.09.45 Auto (exh P15A) and S&B.45 Auto (exh 18A). Based on SP11's report (exh 62), no analysis was conducted on these cartridge cases.

**[75]** SP7, from Forensic Lab PDRM, Cheras, Selangor, received a bullet (*anak peluru*) from SP8 requesting for an examination on (a) whether it

matches any weapon used elsewhere; and (b) what is the calibre of the bullet in question (see exh P40). SP7, after having examined the bullet, in his report (exh P43) stated as follows:

> (1) Pemeriksaan fizikal barang kes di Bil.1 mendapati beratnya adalah 181 grain. Bilangan land & Grooves anak peluru tidak dapat dipastikan disebabkan mengalami kerosakan. Berdasarkan berat anak peluru tersebut, adalah bersesuian dengan senjatapi berkaliber .45.
>
> (2) Serpihan anak peluru barang kes di Bil.1 tidak dapat dianalisa kerana tidak mempunyai nilai-nilai individual karektoristik yang mencukupi untuk dijadikan asas perbandingan disebabkan keadaan fizikal mengalami kerosakan.

**[76]** The machetes, cartridge cases, the GSR analysis report and the bullet recovered from the crime scene could not in any manner implicate that the accused committed the offence. No pistol was recovered from the crime scene. All the evidence adduced by the prosecution could not point to the guilt of the accused. All these circumstantial evidence at best projected that a shooting took place at Ladang Bukit Lembu that night, and that someone shot the deceased. The only link between the accused and the killing of the deceased was that of the testimonies of SP1, SP3 and SP4. Unfortunately, the veracity of these testimonies was seriously questionable.

CONCLUSION

**[77]** Based on the above analysis from the evidence of the prosecution's case, I was amply satisfied that the prosecution's case and its evidence could not withstand the microscopic scrutiny of the maximum evaluation test.

**[78]** I had also carried out a tooth combed exercise on the testimonies of the pathologist SP6, the chemist SP11, the investigating officer SP12 and the others, I could not find any credible evidence which could implicate the accused as having committed the offence as charged.

**[79]** After having considered all the evidence before me, I was not satisfied that the prosecution has successfully established the essential element of actus reus in the offence charged against the accused, ie the accused was the one who committed the act of shooting the deceased. Hence, I found the prosecution has failed to prove a prima facie case at the end of the prosecution's case. It was on this premise that I had ordered an acquittal on the accused be recorded at the close of the prosecution's case.

*Accused acquitted at end of prosecution's case.*

Reported by Dzulqarnain Ab Fatar